Filed 5/17/10 In re B.H. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re B.H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. B.H., Defendant and Appellant.	C060827 (Super. Ct. No. JV127935)

The juvenile court sustained a petition alleging that between July 23, 2004, and July 22, 2007, the minor, B.H., committed four counts of lewd and lascivious conduct with a child under the age of 14. (Pen. Code, § 288, subd. (a); Welf. & Inst. Code, § 602, subd. (a).) The court placed B.H. on probation, and he timely appealed.

This was a he-said/he-said case. The victim was B.H.'s stepbrother C., and at times the two boys lived together. C. testified B.H. molested him on several occasions; B.H. denied it. There was no corroborating evidence, such as medical evidence, incriminating statements or suspicious behavior. The juvenile court believed C., and in part pointed out the lack of any clear motive for him to lie.

Appellate counsel contends the juvenile court cut off trial counsel's ability to establish a motive for C. to lie, by improperly curtailing cross-examination of C. and C.'s mother. Appellate counsel cites five record passages in support of the claim, but fails to explain what questions were asked or to discuss the trial court's stated reasons for cutting off lines of questioning, thus forfeiting the contention of error. Moreover, the five record passages do not support the claim of error. Instead, they show the juvenile court cut off irrelevant or marginally relevant lines of questioning. These were routine rulings, of the sort made by judges every day, and do not show the minor's confrontation clause rights were impaired.

Accordingly, we affirm the juvenile court judgment.

FACTS

Given the nature of the issues raised on appeal, we need not describe the facts in great detail. Generally, it is enough to observe that the case rested on the credibility of C., because there was otherwise no corroborating evidence.

B.H. was 19 at the time of these proceedings.

C. was 15 at the time of the jurisdictional hearing. He lives alternately with his father and mother, who are now married to other people. His mother's household included a stepfather and half brother, and sometimes B.H., C.'s stepfather's son.

C. testified that when he was 10 or 11, B.H., then 14 or 15, lived with him in a house in Elk Grove. C. testified B.H. molested him on two occasions at that house. On the first occasion, B.H. took C.'s hand and used it to rub B.H.'s penis, and B.H. also used his hand to rub C.'s penis (counts 1 and 2). Another time, B.H. pushed his penis into C.'s mouth, but did not ejaculate (count 3). Shortly after that, B.H. went to live with B.H.'s mother.

C.'s mother later moved to Folsom, and the summer before C. entered eighth grade, B.H. visited the Folsom house. One night B.H. again pushed his penis into C.'s mouth, and this time he ejaculated (count 4).

After the abuse, C. saw two therapists for other reasons, but he did not tell them about the abuse. C. first told some friends what happened, and then told a school counselor and the police. The police arranged for C. to make a "pretext" call, but B.H. did not make any incriminating statements.

C.'s story of abuse remained mostly consistent over time, accompanied by minor discrepancies. In part, he testified he

did not feel fully comfortable talking about what happened until he met with the prosecutor shortly before the jurisdictional hearing.

B.H. denied molesting C.

DISCUSSION

On appeal, B.H. contends the juvenile court improperly limited his ability to cross-examine C. and K.H., C.'s mother. We first set forth general legal principles applicable to this claim. Then we explain how appellate counsel has forfeited the claim by failing to provide a coherent argument attacking the juvenile court's rulings. Nevertheless, we shall address, seriatim, the five specific passages of the record cited in support of the claim, and explain why none of them shows an improper restriction on cross-examination.

I.

General Legal Principles

"The right of cross-examination is fundamental. It is fundamental because the Constitution guarantees it to every criminal defendant [citations] and to every juvenile accused of criminal activity [citation]. It also is fundamental in the sense it is the cornerstone and primary *raison d'etre* of the Anglo-American adversary system. . . . [¶] Cross-examination cannot serve its critical function unless trial lawyers are given wide latitude in the scope, subject matter and technique of their questioning. This is especially true when the cross-

examiner is testing the credibility of a witness." (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 506-507.)

"'It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant . . . "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish."'" (*People v. Harris* (1989) 47 Cal.3d 1047, 1091 (*Harris*), quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679 [89 L.Ed.2d 674, 683]; *Harris* was criticized in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10.)

In particular, trial courts may "restrict cross-examination, even that by defendants, under well-established principles such as those reflected in Evidence Code section 352, i.e., if the probative value of the evidence 'is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial

danger of undue prejudice, or confusing the issues, or of misleading the jury.'" (*Harris*, *supra*, 47 Cal.3d at p. 1091; see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Further, a misapplication of Evidence Code section 352, a state law violation, does not equate to a Sixth Amendment violation: "'[U]nless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 494 (*Hillhouse*).)

II.

Forfeiture

Appellate counsel fails to develop a coherent legal argument explaining how the trial court violated B.H.'s right to confront witnesses. The only portion of counsel's argument that provides relevant citations to the record in support of the claim of error is the following paragraph:

"In this case, the trial court curtailed defense counsel's cross-examination not only of [C.] but also of K[.]H. concerning not only [C.'s] motive for testifying falsely, but also concerning basic aspects of [C.'s] ability to recall the events. In its adjudication of the petition, the trial court went on to state that '[Defense counsel] did everything in her considerable

abilities to try and come up with some theory as to what motive [C.] may have had. Many of these were theories. Some were objected to. In many cases, those objections were sustained because the theories were speculative and remote.' (RT 208)"

Appellate counsel does not give the specifics of questions that were disallowed, the reasons given by the juvenile court for disallowing any questions, nor any analysis of why any question was wrongly disallowed. We are invited to read five pages and figure out for ourselves what legal error occurred.[1]

We conclude that the contention of error has been forfeited for lack of an adequate, coherent, argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164 ["This court is not inclined to act as counsel for . . . any appellant and furnish a legal argument as to how the trial court's rulings in this regard constituted an abuse of discretion"]; accord, *Estate of Palmer* (1956) 145 Cal.App.2d 428, 431 ["Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right"].)

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[1] A couple of details are provided in the reply brief, but this does not cure the problem. Further, it is improper to withhold claims until the reply brief. (See *People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028.)

We note that counsel spends four full pages discussing the prejudice from the juvenile court's purported errors. It is appropriate to provide a prejudice analysis, but it does not cure the failure to provide analysis showing *error.*

However, to forestall a claim of incompetence of appellate counsel, in the next section we shall address each passage briefly to show why no error has been demonstrated.

III.

Claimed Violations

We discuss each of the five claims seriatim.

A. ***Pretrial Interviews with the Prosecutor***

Appellate counsel suggests the juvenile court refused to allow trial counsel to explore C.'s interviews with the prosecutor. To provide context, we must begin earlier than "RT 70," the only page cited on this point.

Five pages earlier, trial counsel asked whether C. had reviewed documents—presumably reflecting pretrial statements he made—with the prosecutor, and C. testified "she [the prosecutor] did not go over them with me" although he had spoken with her about what happened to him. After counsel elicited that C. had spoken with the prosecutor twice, counsel went into detail about the meetings, and when counsel asked, "did she [the prosecutor] begin to talk, or did you begin to talk?" the court broke in and asked why this was relevant. When counsel said she wanted to explore how C. had been prepared, the court replied it was "standard operating procedure" for lawyers to interview witnesses, and asked whether counsel asserted the prosecutor did anything wrong: Defense counsel said no, but she wanted to find out if C.'s memory had been refreshed "by anything[.]"

The juvenile court said that counsel could inquire about "specific information" in C.'s testimony, such as inconsistencies with any reports, "But you have to have something specific to warrant going into the district attorney's interview. [¶] Otherwise, if she had 17 witnesses, we could go through this 17 times. And this is not the way it works." "We are not going to just go through everything that was said . . . unless you have something specific in mind which comes up during his testimony." When counsel continued to ask about C.'s interview with the prosecutor, the court instructed her to "get on to the facts of the case." However, the trial court indicated counsel could inquire about C.'s memory. Counsel then asked whether C. had discussed what happened with anyone else and the trial court allowed that line of inquiry.

Eventually, C. testified he only "opened up" fully to the prosecutor, whom he admired, and that is why his statements to the police and counselor differed from his trial testimony.

We agree with the juvenile court that it would be an undue consumption of time, and serve little purpose, to go through every detail of the interviews C. had with the prosecutor, in the absence of a suggestion that the prosecutor tainted the witness. Here trial counsel disavowed this suggestion and in the absence of any specific concerns about the interviews, the court's ruling was correct. The court wanted counsel to focus on the *facts*, rather than go fishing. The court left counsel

free to ask about C.'s memory and to explore any specific inconsistencies in his testimony.

Accordingly, the trial court properly limited cross-examination under Evidence Code section 352. (*Harris*, *supra*, 47 Cal.3d at p. 1091.) Further, the limitation on cross-examination, if error, did not cause any confrontation clause violation, because had the prohibited cross-examination been allowed, it would not have caused a significantly different impression of C.'s credibility. Counsel was free to attack C.'s memory, and whether he had made inconsistent statements. (See *Hillhouse*, *supra*, 27 Cal.4th at p. 494.)

B. *C.'s Dislike of B.H.'s Father's Household Rules*

B.H.'s father, R., and C. both testified they got along with each other, except for typical teenage things, such as one incident where C. lied about riding in a car. Appellate counsel cites page "119" in support of the suggestion that the juvenile court improperly curtailed an exploration of their relationship.

On page 119 of the transcript, we see two sustained relevancy objections. The first was a relevancy objection to a question whether there had been "more difficulty between" R. and C.'s mom, K.H., *after* C. reported the alleged abuse.

Relevant evidence has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) A trial court's ruling on relevance is reviewed for abuse of discretion.

(*People v. Panah* (2005) 35 Cal.4th 395, 474 (*Panah*).) Under this test, we cannot say the trial court abused its discretion in concluding this evidence lacked relevance. Nor would this ruling equate to a confrontation clause violation, even if we found error. (See *Hillhouse*, *supra*, 27 Cal.4th at p. 494.)

The second sustained relevancy objection on page 119 was to the following question: "You can't get your way with R[.], can you?" C. had already testified that he liked R., but "didn't like R[.]'s rules." We cannot say the trial court abused its discretion in concluding the question, as framed, lacked relevance. (See *Panah*, *supra*, 35 Cal.4th at p. 474.) If it had some relevance, it was minimal and the question was cumulative to the prior questions on the subject, therefore the objection was sustainable under Evidence Code section 352. (*Harris*, *supra*, 47 Cal.3d at p. 1091.) Finally, if there had been error, which we do not find, it would not have risen to the level of a confrontation clause violation. (See *Hillhouse*, *supra*, 27 Cal.4th at p. 494.)

C. *Disclosure to C.'s Sister*

C. testified that he was close to his sister, and when she learned of the alleged abuse, she visited him.

On the page cited on appeal, trial counsel asked C.'s mother whether she had told other family members about C.'s allegations of abuse, and then asked whether C.'s mother had invited C.'s sister over to speak with C. The juvenile court

sustained relevancy objections to both of these questions. The trial court did not abuse its discretion in concluding that these questions lacked relevance. (See *Panah*, *supra*, 35 Cal.4th at p. 474.) Nor would these rulings equate to confrontation clause violations, if they violated state law. (See *Hillhouse*, *supra*, 27 Cal.4th at p. 494.)

D. *Family Strains*

Counsel elicited from C.'s mother that the disclosure of alleged abuse had upset the family, but was not allowed to ask if it had "strained" her relationship with B.H.'s father or with her ex-husband, because the juvenile court ruled it was irrelevant and beyond the scope of direct.

We cannot say the trial court abused its discretion in concluding that what happened to C.'s mother's relationship with either her husband or her ex-husband after C. disclosed the abuse lacked relevance to this case. (See *Panah*, *supra*, 35 Cal.4th at p. 474.) Nor would this ruling equate to a confrontation clause violation, if it violated state law. (See *Hillhouse*, *supra*, 27 Cal.4th at p. 494.)

E. *C.'s Shyness and Need for Approval*

Counsel was allowed to ask C.'s mother if C. had been "a shy young man and wanted acceptance" when the family lived in Elk Grove, where two occasions of molestation took place. Counsel was not allowed to ask whether he was *still* shy and

wanted acceptance, because the juvenile court ruled that whether C. was still shy was irrelevant.

We cannot say the trial court abused its discretion in concluding that whether C. was still shy was irrelevant. (See *Panah*, *supra*, 35 Cal.4th at p. 474.) Nor would this ruling equate to a confrontation clause violation, if it violated state law. (See *Hillhouse*, *supra*, 27 Cal.4th at p. 494.)

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

HULL, J.